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82-155

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CREDITHRIFT OF AMERICA, INC., Petitioner

vs.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 522 (f) of the Bankruptcy Reform Act of 1978, allowing avoidance of certain liens on personal property, may be constitutionally applied to liens perfected after the enactment date (November 6, 1978) but before the effective date of the Act (October 1, 1979).

2. This case differs from Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10 Cir. 1981) prob. jur. noted 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-184) in that Rodrock deals with pre-enactment date liens whereas this case deals with pre-effective date liens.

PARTIES

The United States was the intervenor at the Court of Appeals. Debtors Harry George Webber, Susan Marie Webber and

II

Everett Yoder Jr. and Elizabeth Yoder take no part in this appeal, the United States representing their interest in this matter.

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE TITLE II:

§ 522(f)

No. _____

IN THE

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OCTOBER TERM

CREDITHRIFT OF AMERICA, INC., Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Credithrift of America, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Apeals for the Ninth Circuit entered in this proceeding on April 14, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears in the Appendix hereto.

JURISDICTION

The expedited judgment of the Court of Appeals for the Ninth Circuit was entered on April 14, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is revoked under 28 USC § 1254 (1).[1]

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE TITLE II:

§ 522(f)

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the

[1] The United States was the intervenor at the Court of Appeals. Debtors Harry George Webber, Susan Marie Webber and Everett Yoder Jr. and Elizabeth Yoder take no part in this appeal, the United States representing their interest in this matter.

debtor in property to the extent that such impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) A judicial lien; or

(2) A nonpossessory, nonpurchase-money security interest in any --

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, or the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

STATEMENT OF THE CASE

On July 2, 1979, defendant/appellant Credithrift made a loan to Everett and Elizabeth Yoder. The Yoders executed a note for $2,508.90, payable to

Credithrift, and signed a form pleding their household furnishings, goods and appliances as security for the loan. On July 23, 1979, Credithrift made a loan to Harry G. and Susan Marie Webber, who executed a note for $3,224.96 and signed a similar security agreement. The parties stipulated that each lien is a "nonpossessory, nonpurchase-money security interest" that arose after November 6, 1978 and before October 1, 1979.

The Webbers and Yoders subsequently filed petitions in bankruptcy on May 5, 1980 and July 1, 1980 respectively. Each couple sought to avoid the Credithrift liens in their exempt household goods pursuant to § 522(f)(2)(A). Credithrift asserted that § 522(f)(2)(A) cannot be constitutionally applied in these cases because the security interests were perfected prior to the effective date of

the Reform Act. The constitutional queston was certified to the Attorney General of the United States, who, through the United States Attorney, intervened, pursuant to 28 U.S.C. § 2043, in support of the constitutionality of the challenged provision.

On November 17, 1980 the bankruptcy court concluded in the Webber case that "§522(f)(2) is constitutional in so far as it applies to liens arising between November 6, 1978 and October 1, 1979, and the plaintiffs are entitled to the voiding of the defendant's lien on their household furnishings, household goods and appliances." In re Webber, 7 B.R. 580, 586 (Bkrtcy. D. Ore. 1980). A stipulated judgment was subsequently entered in the Yoder case allowing similar relief based upon the Webber decision. Both cases came to the Court of Appeals for the Ninth

Circuit on an expedited direct appeal pursuant to 28 U.S.C. § 1293(b). In the Court of Appeals for the Ninth Circuit and in this petition for review, the United States, in effect, represents the debtors.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS WELL AS OTHER COURTS AS TO THE PROPER INTERPRETATION OF 11 U.S.C. § 522.

As ably noted in the decision of the Court below, the Bankruptcy Courts and the Courts of Appeals are divided with respect to the retroactive applicability of § 522(f)(2)(A). Bankruptcy Courts in Oklahoma, Colorado, Oregon, Michigan, Washington, Kansas, and New Mexico have held that § 522 cannot be applied to liens perfected before the Reform Act's enactment date.[2] This holding was

[2] See In Re Pierce, 4 B.R. 671 (Bkrtcy. W.D. Okla. 1980); Rodrock v. Security Industrial Bank, 3 B.R. 629 (Bkrtcy. D. Colo. 1980) aff'd

followed by the Court of Appeals for the Tenth Circuit in Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10 Cir. 1981) prob. jur. noted. So. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184), and by the Court of Appeals for the Seventh Circuit in In Re Gifford, 669 F.2d 468 (F. Cir. 1982).

Bankruptcy courts in Ohio, Utah and Wisconsin have held that § 522 (f)(2)(A)

642 F.2d 1193 (10 Cir. 1981) prob. jur. noted. So. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184); In Re Jackson, 4 B.R. 293 (Bkrtcy. D. Colo. 1980) aff'd 642 F. 2d 1193 (10 Cir. 1981) prob. jur. noted, So. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184); In Re Hawley, 4 B.R. 147 (Bkrtcy. D. Ore. 1980); In Re Malpeli, F B.R. SOB (Bkrtcy. N.D. Ill. 1980); In Re Woods, 9 B.R. 325 (Bkrtcy. E.D. Mich. N.D. 1981); In Re Ribb, 10 B.R. 40 (Bkrtcy. E.D. Mich. S.D. 1981); In Re Williams, 8 B.R. 40 (Bkrtcy. E.D. Wash. 1981); Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980); Oldham v. Beneficial Finance, 7 B.R. 124 (Bkrtcy. D. N.M. 1980)

may be applied to pre-enactment liens.[3] This holding was followed by the Court of Appeals for the Third Circuit in In Re Ashe t/a C & S Fuel Service, 669 F.2d 105 3 Cir. 1982).

Bankruptcy courts in Tennessee, Illinois, Wisconsin, Nevada, Texas, Oregon, Colorado, Louisiana, Missouri, Kansas, Georgia and Ohio have held that § 522(f)(2)(A) may be applied to liens created after the Reform Acts enactment date but before its effective date, i.e. in the so called "gap" period.[4] Both Ashe

[3] See Matter of Rutherford, 4 B.R. 510 (Bkrtcy. S.D. Ohio W.D. 1980); In Re Ambrose, 4 B.R. 395 (Bkrtcy. N.D. Ohio 1980); In Re Curry, 5 B.R. 282 (Bkrtcy. N.D. Ohio 1980), aff'd., Curry v. Assoc. Financial Services, 11 B.R. 716 (N.D. Ohio E.D. 1981); In Re Sweeney, 7 B.R. 814 (Bkrtcy. E.D. Wisc. 1980); In Re Pillow, 8 B.R. 404 (Bkrtcy. D. Utah 1981).

[4] See In Re Head, 4 B.R. 521 (Bkrtcy. D. Tenn. 1980); In Re Beck, 4 B.R. 661 (Bkrtcy. C.D. Ill. 1980); In Re Sweeney, 7 B.R. 814 (Bkrtcy. E.D.

and Gifford supra, impliedly support this holding while Rodrock, supra, impliedly holds to the contrary.

Courts in Michigan, Washington, Oklahoma, Colorado (dealing with § 522(f)(1) - judicial liens) Kansas and

Wisc. 1980); In Re Bradford, 6 B.R. 741 (D. Nev. 1980) (dealing with § 522(f)(1) - judicial liens); In Re Brown, 7 B.R. 264 (Bkrtcy. N.D. Texas 1980); In Re Hawley, 4 B.R. 147 (Bkrtcy. D. Ore. 1980); In Re Seltzer, 7 B.R. 80 (Bkrtcy. D. Colo. 1980); Wells v. Person-to-Person Citicorp, 7 B.R. 875 (Bkrtcy. D. Colo. 1980); In Re Pape, 7 B.R. 443 (Bkrtcy. N.D. Fla. 1980); In Re Steinart, 4 B.R. 354 (Bkrtcy. W.D. La. 1980); Matter of Baker, 5 B.R. 397 (Bkrtcy. W.D. Mo. 1980), modified en banc, In Re Baker, 11 B.R. 125 (Bkrtcy. W.D. Mo. 1981); Matter of Primm, 6 B.R. 142 (Bkrtcy. D. Kan. 1980); Matter of Rutherford, 4 B.R. 510 (Bkrtcy. S.D. Ohio 1980)(by implication); In Re Ambrose, 4 B.R. 395 (Bkrtcy. N.D. Ohio 1980)(by implication); In Re Curry, 5 B.R. 282 (Bkrtcy. N.D. Ohio 1980)(by implication), aff'd., Curry v. Assoc. Financial Services, 11 B.R. 716 (N.D. Ohio 1981); Matter of Ward, 14 B.R. 549 (Bkrtcy. S.D. Ga. 1981).

Florida have held that the effective date is controlling and that § 522(f)(A)(2) cannot be applied to liens vested before that date.[5] It will be noted that the bankruptcy courts in Colorado and Kansas are themselves divided. In In Re Henderson, 10 B.R. 19 (Bkrtcy. N.D. Indiana 1980), the court ruled against giving retroactive effect to § 522 but left open the question of whether the controlling date was the enactment date or the effective date.

[5] See In Re Woods, 9 B.R. 325 (Bkrtcy. E.D. Mich. N.D. 1981); Matter of Bibb, 10 B.R. 40 (Bkrtcy. E.D. Mich. S.D. 1981); In Re Williams, 8 B.R. 562 (Bkrtcy. E.D. Wash. 1981); In Re Seiler, 8 B.R. 542 (Bkrtcy. W.D. Okla. 1981); Lucero v. Security Industrial Bank, 4 B.R. 659 B. Ct. D. Colo. 1980) (dealing with § 522(f)(1) - judicial liens; Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980), aff'd., 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-814); In Re Pape, 7 B.R. 443 (Bkrtcy. N.D. Fla. 1980).

Because this case came before the Court of Appeals on an expedited appeal and aside from what is implied in Ashe, Gifford and Rodrock, no appellate court other than in the present case has directly ruled on the applicability of § 522(f) to liens vested during the "gap" period. There is however considerable conflict among the decisions available for this court to decide to hear this case.[6]

It can be concluded from the opinion itself and the review of prior decisions in the present case that even the United States Court of Appeals for the Ninth Circuit is impliedly asking for guidance in this important question of Federal Bankrtupcy Law.

2. THE DECISION BELOW CONFLICTS WITH THE

[6] See also the attached opinion and the cases cited therein for an exhaustive review of the law to date.

DECISION OF THIS COURT IN LOUISVILLE JOINT STOCK LAND BANK V. RADFORD, 295 U.S. 555 (1935).

A full discussion of Radford and the conflicting decisions are contained in the decision of the Court of Appeals for the Ninth Circuit in this case.

Briefly, Radford held that the Frazier-Lemke Act was unconstitutional under the Fifth Amendment. This Court held that although the Court may discharge a debtor's personal obligations, it could not take for the benefit of the debtor, substantive rights in specific property acquired by the creditor prior to the Act 295 U.S. 594-95.

The present opinion appealed from allows such a taking of the vested property right from the creditor. This is contrary to the Radford decision. See the review of Radford contained in the opinion

attached hereto.

3. THE SITUATION IN THE PRESENT CASE IS SIMILAR TO ONE PRESENTLY BEFORE THE COURT AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND SHOULD BE DECIDED BY THIS COURT.

As noted in the attached Motions for Consideration (Appendix App. 21) this Court will be addressing the question of the applicability of 11 U.S.C. § 522 to pre-enactment liens. Rodrock v. Security Industrial Bank, prob. jur. noted 50. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184).

In the interest of completeness and expediency, this Court should also determine the applicability of § 522 to pre-effective date (but post-enactment date) liens such as those found in the present case.

CONCLUSION

For these reasons, a writ of

certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

July 20, 1982

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APPENDIX

1. Full Opinion and Judgment of U.S. Ct. of Appeals Ninth Circuit - Decision . . App. 1

2. Motion for Consolidation . . App. 32

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re HARRY GEORGE WEBBER, SUSAN MARIE WEBBER, Debtors.	C.A. No. 81-3055
HARRY GEORGE WEBBER, SUSAN MARIE WEBBER, Plaintiffs-Appellees, and THE UNITED STATES OF AMERICA, Intervenor v. CREDITHRIFT OF AMERICA, INC., Defendant-Appellant.	Bankruptcy No. 380-00919 Adversary Proceedings No. 80-0080
AND In Re EVERETT YODER, JR., and ELIZABETH YODER, Debtors.	C.A. No. 81-3128
EVERETT YODER, JR. and ELIZABETH YODER, Plaintiffs- Appellees, and THE UNITED STATES OF AMERICA, Intervenor v. CREDITHRIFT OF AMERICA, INC., Defendant-Appellant.	Bankruptcy No. 380-0763 Adversary Proceedings No. 80-0114 O P I N I O N

Appeal from the United States
Bankruptcy Court
For the District of Oregon
Folger Johnson, Bankruptcy Judge
Argued and Submitted September 11, 1981
Decided

Before: KILKENNY and SCHROEDER, Circuit Judges and JAMESON, * District Judge

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

JAMESON District Judge:

Credithrift of America, Inc. (Credithrift perfected liens on personal property of the debtors between the enactment date (November 6, 1978) and the effective date (October 1, 1979) of the Bankruptcy Reform Act of 1978. Credithrift has appealed from two decisions of the Bankruptcy Court for the District of Oregon which applied 11 U.S.C. § 522(f) of the Reform Act to those liens, thereby allowing their avoidance by the debtors. The sole question on appeal is whether § 522(f) may constitutionally be applied to liens perfected after the enactment date but before the effective date of the Act.

I. Legislative Background

The Reform Act was passed by Congress

on October 6, 1978 and signed into law by the President on November 6, 1978. The effective date of the Act was October 1, 1979.

A primary goal of the Reform Act, the first major revision of the Bankruptcy Act since 1938, was to provide an effective modern bankruptcy mechanism for consumer debtors. Congress recognized that consumer credit had become a fundamental element of the post-war economy and that the laws needed reform to make "bankruptcy a more effective remedy for the unfortunate consumer debtor." H.R. Rep. No. 95-595, 95th Cong., 2nd Sess. 4 (1978), reprinted in 5 U.S. Code Cong. & Ad. News [U.S.C.C.A.N. 5966 (1978)].

Congress found that most state bankruptcy laws were as outmoded as the federal laws and that there was a federal interest in seeing that a debtor survives bankruptcy with adequate possessions to

avoid becoming a public charge and to make a fresh start. Id. at 126, reprinted in 5 U.S.C.C.A.N. 6087. Accordingly, Congress established a set of federal exemptions which serve as an alternative to state bankruptcy law exemptions. Section 522(d) of the Reform Act provides for the exemption of specified personal property from the portion of the debtor's estate subject to sale in bankruptcy for the satisfaction of debts, including

> (3) The debtor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

As the bankruptcy court noted, "Any excess value will usually be exempt through the use of subsection (d)(5) which gives the debtor another $400.00 general exemption and the right to apply the 'spill over' from the unused portion of the homestead exemption

under subsection (d)(1)."

Congress recognized, however, that something more was needed, because the purpose of household property exemptions had often been frustrated by creditors who acquired dragnet security interests in otherwise exempt property when making consumer loans. Consequently, Congress included § 522(f)[1] in the Reform Act to

1. The purpose of Section 522(f) of the Bankruptcy Code is stated in the following excerpt from the House of Representatives Report:

> In addition, the bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may void any judicial lien on exempt property, and any nonpurchase-money security interest in certain exempt property such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before benkruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions. The second right will be of more significance for the average consumer debtor. Frequently, creditors lending money to a consumer debtor take a security

allow debtors to avoid certain security

> interest in all of the debtor's belongings, and obtain a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all of the debtor's household goods as a means of obtaining payment.
>
> In fact, were the creditor to carry through on his threat and foreclose on the property, he would receive little, for household goods have little resale value. They are far more valuable to the creditor in the debtor's hands, as they provide a credible basis for threat, because the replacement costs of the goods are generally high. Thus, creditors rarely repossess, and debtors ignorant of the creditors' true intentions, are coerced into payments they simply cannot afford to make.
>
> The exemption provision allows the debtor, after bankruptcy has been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods. Such security interests have too often been used by over-reaching creditors. The bill eliminates any unfair advantage creditors have. H.R. Rep. No. 95-595, 95th Cong., 2nd Sess. 126-27 (1978), reprinted in 5 U.S.C.C.A.N. 6087-88

interests of creditors:

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
>
> (1) a judicial lien;
>
> (2) a nonpossessory, nonpurchase-money security interest in any --
>
> > (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
> >
> > (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
> >
> > (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

II. Factual and Procedural Background

On July 2, 1979, defendant/appellant Credithrift made a loan to Everett and Elizabeth Yoder. The Yoders executed a note

(1978).

for $2,508.90 payable to Credithrift, and signed a form pledging their household furnishings, goods and appliances as security for the loan. On July 23, 1979, Credithrift made a loan to Harry G. and Susan Marie Webber, who executed a note for $3,224.96 and signed a similar security agreement. The parties stipulated that each lien is a "nonpossessory, nonpurchase-money security interest" that arose after November 6, 1978 and before October 1, 1979.

The Webbers and Yoders subsequently filed petitions in bankruptcy on May 5, 1980 and July 1, 1980 respectively. Each couple sought to avoid the Credithrift liens in their exempt household goods pursuant to § 522(f)(2)(A). Credithrift asserted that § 522(f)(2)(A) cannot be constitutionally applied in these cases because the security interests were perfected prior to the effective date of the Reform Act. The constitutional question was certified to the

Attorney General of the United States, who, through the United States Attorney, intervened, pursuant to 28 U.S.C. § 2403, in support of the constitutionality of the challenged provision.

On November 17, 1980 the bankruptcy court concluded in the Webber case that "§ 522(f)(2) is constitutional in so far as it applies to liens arising between November 6, 1978 and October 1, 1979, and the plaintiffs are entitled to the voiding of the defendant's lien on their household furnishings, household goods and appliances." In re Webber, 7 B.R. 580, 586 (Bkrtcy. D. Ore. 1980). A stipulated judgment was subsequently entered in the Yoder case allowing similar relief based upon the Webber decision. Both cases have come to this court on direct appeal pursuant to 28 U.S.C. § 1293(b). In this court, the United States, in effect, represents the debtors/appellees.

III. Contentions of Parties

Appellant contends that (1) § 522(f)(2)(A) cannot be given retroactive effect because to do so would be manifestly unreasonable; (2) a creditor whose rights in specific property have attached prior to the effective date of the law may not be deprived of those rights by legislative enactment, and giving retroactive effect to § 522(f)(2) amounts to an unconstitutional taking of property under the holding in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); (3) the public cannot be considered to be "on notice" of a statute until it is made effective, and both parties were on notice of the effective date; and (4) the Fifth Amendment protects all property interests, whether real or personal, regardless of monetary value.

Appellee contends that (1) the bankruptcy law comports with due process because it is not so grossly unreasonalbe or

arbitrary as to be incompatible with fundamental law; (2) because appellant was on notice of the contents of § 522(f)(2)(A) when the liens were perfected, there is no retroactive effect of constitutional dimension; (3) even if considered to be retroactive, application of § 522(f)(2)(A) is constitutional because if effectuates sound Congressional policy; (4) Radford has been severely limited by subsequent case law and is inapplicable to this case; and (5) the Fifth Amendment does not protect ownership of these liens because they are not property interests of "substantial value."

IV. Prior Court Decisions

At the outset it may be noted that both the bankruptcy courts and the courts of appeal are divided with respect to the retroactive applicability of § 522(f)(2)(A). Bankruptcy courts in Oklahoma, Colorado, Oregon, Michigan, Washington, Kansas, and

New Mexico have held that it cannot be applied to liens perfected before the Reform Act's enactment date.[2] This holding was followed by the Court of Appeals for the Tenth Circuit in Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-814), and by the Court of Appeals for the Seventh Circuit

2. See In Re Pierce, 4 B.R. 671 (Bkrtcy. W.D. Okla. 1980); Rodrock v. Security Industrial Bank, 3 B.R. 629 (Bkrtcy. D. Colo. 1980), aff'd., 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-814); In Re Hoops, 3 B.R. 635 (Bkrtcy. D. Colo. 1980), aff'd., 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-814); In Re Jackson, 4 B.R. 293 (Bkrtcy. D. Colo. 1980), aff'd., 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-814); In Re Hawley, 4 B.R. 147 (Bkrtcy. D. Ore. 1980); Matter of Malpeli, 7 B.R. 508 (Bkrtcy. N.D. Ill. 1980); In Re Woods, 9 B.R. 325 (Bkrtcy. E.D. Mich. N.D. 1981) (by implication); Matter of Bibb, 10 B.R. 40 (Bkrtcy. E.D. Mich. S.D. 1981) (by implication; In Re Williams, 8 B.R. 562 (Bkrtcy. E.D. Wash. 1981) (by implication); Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980); Oldham v. Beneficial Finance, 7 B.R. 124 (Bkrtcy. D. N.M. 1980).

in In the Matter of: Willis R. Gifford and Jacqueline M. Gifford, No. 81-1174 (7 Cir. Jan. 21, 1982) ("Gifford").[3] Bankruptcy courts in Ohio, Utah and Wisconsin have held that § 522(f)(2)(A) may be applied to pre-enactment liens.[4] This holding was followed by the Court of Appeals for the Third Circuit in In re: Charles E. Ashe and Susan J. Ashe, t/a C & S Fuel Service, Debtors, et al., No. 81-1629 (3 Cir. Jan. 6, 1982) ("Ashe").

Bankruptcy courts in Tennessee, Illinois, Wisconsin, Nevada (dealing with § 522(f)(1) - judicial liens), Texas, Oregon, Colorado, Louisiana, Missouri, Kansas,

3. In Rodrock and Gifford, as here, the United States in effect represented the debtors.

4. See Matter of Rutherford, 4 B.R. 510 (Bkrtcy. S.D. Ohio W.D. 1980); In Re Ambrose, 4 B.R. 395 (Bkrtcy. N.D. Ohio 1980); In Re Curry, 5 B.R. 282 (Bkrtcy. N.D. Ohio 1980), aff'd., Curry v. Assoc. Financial Services, 11 B.R. 716 (N.D. Ohio E.D. 1981); In Re Sweeney, 7 B.R. 814 (Bkrtcy. E.D. Wisc. 1980); In Re Pillow, 8 B.R. 404 (Bkrtcy. D. Utah 1981).

Georgia and Ohio have held that § 522(f)(2)(A) may be applied to liens created after the Reform Act's enactment date but before its effective date, i.e., in the so called "gap" period Both Ashe and Gifford [6]

5. See In Re Head, 4 B.R. 521 (Bkrtcy. D. Tenn. 1980); In Re Beck, 4 B.R. 661 (Bkrtcy. C.D. Ill. 1980); In Re Sweeney, 7 B.R. 814 (Bkrtcy. E.D. Wisc. 1980); In Re Bradford, 6 B.R. 741 (D. Nev. 1980) (dealing with § 522(f)(1) - judicial liens); In Re Brown, 7 B.R. 264 (Bkrtcy. N.D. Texas 1980); In Re Hawley, 4 B.R. 147 (Bkrtcy. D. Ore. 1980); In Re Seltzer, 7 B.R. 80 (Bkrtcy. D. Colo. 1980); Wells v. Person-to Person Citicorp, 7 B.R. 875 (Bkrtcy. D. Colo. 1980); In Re Pape, 7 B.R. 443 (Bkrtcy. N.D. Fla. 1980); In Re Steinart, 4 B.R. 354 (Bkrtcy. W.D. La. 1980); Matter of Baker, 5 B.R. 397 (Bkrtcy. W.D. Mo. 1980), modified en banc, In Re Baker, 11 B.R. 125 (Bkrtcy. W.D. Mo. 1981); Matter of Primm, 6 B.R. 142 (Bkrtcy. D. Kan. 1980); Matter of Rutherford, 4 B.R. 510 (Bkrtcy. S.D. Ohio 1980) (by implication); In Re Ambrose, 4 B.R. 395 (Bkrtcy. N.D. Ohio 1980) (by implication); In Re Curry, 5 B.R. 282 (Bkrtcy. N.D. Ohio 1980) (by implication), aff'd., Curry v. Assoc. Financial Services, 11 B.R. 716 (N.D. Ohio 1981); Matter of Ward, 14 B.R. 549 (Bkrtcy. S.D. Ga. 1981).

6. The Gifford court said:

> [G]iving § 522(f)(2) prospective effect only simply means that the power of avoiding liens under its provisions will take effect on October 1, 1979,

impliedly support this holding, while Rodrock is equivocal.[7] Courts in Michigan, Washington, Oklahoma, Colorado (dealing with § 522 (f)(1) - judifical liens) Kansas and Florida have held that the effective date is

> and apply to all liens arising after that date. Liens created prior to that date will continue to be effective under state law - precisely as they were under the Old Bankruptcy Act.

Slip op. at 11. But the court also said:

> We agree that because post-enactment, pre-effective creditors had notice at the time credit was extended and their lien attached that the new Code would govern subsequent bankruptcies, even though the new Code was not technically effective, they should be treated the same as post-effective creditors.

Slip op. at 12 n. 3. Although this language appears to be in conflict, we interpret Gifford to imply that § 522(f) may validly be applied to "gap" period liens.

7. Rodrock, 642 F.2d 1193, affirmed Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980), which held that § 522(f) was unconstitutional as to both pre-enactment and "gap" period liens. 8 B.R. at 14, 16. Since the Rodrock court stated that it was considering only pre-enactment date liens, 642 F.2d at 1196 n. 3, however, it cannot be assumed that the Schulte holding with regard to "gap" period liens was affirmed.

controlling and that § 522(f)(A)(2) cannot be applied to liens vested before that date.[8] It will be noted that the bankruptcy courts in Colorado and Kansas are themselves divided. In In Re Hendeson, 10 B.R. 19 (Bkrtcy. N.D. Indiana 1980), the court ruled against giving retroactive effect to § 522 but left open the enactment date or the effective date. Aside from what is implied in Ashe and Gifford, no appellate court has directly ruled on the applicability of § 522(f) to liens vested during the "gap" period.

8. See In Re Woods, 9 B.R. 325 (Bkrtcy. E.D. Mich. N.D. 1981); Matter of Bibb, 10 B.R. 40 (Bkrtcy. E.D. Mich. S.D. 1981); In Re Williams, 8 B.R. 562 (Bkrtcy. E.D. Wash. 1981); In Re Seiler, 8 B.R. 542 (Bkrtcy. W.D. Okla. 1981); Lucero v. Security Industrial Bank, 4 B.R. 659 (B. Ct. D. Colo. 1980) (dealing with § 522(f)(1) - judicial liens); Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980), aff'd., 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-814); In Re Pape, 7 B.R. 443 Bkrtcy. N.D. Fla. 1980).

V. Retroactive Effect

The significance of "Legislative intent" in determining whether a statute may be applied retroactively was well stated in Matter of Ward, 14 B.R. at 557-58:

> A retroactive statute is one "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions or considerations already past." 16A Am Jur.2d Constitutional Law § 661, at 641 (1979). As a general rule of construction "'legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'." Greene v. United States, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964) (quoting Union Pac. R.Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913)). Thus, the issue whether section 522(f) has retroactive application turns on a determination of legislative intent. See Hassett v. Welch, 303 U.S. 303, 58 S.Ct. 559, 82 L.Ed. 858 (1938).[9] (footnote ommited).

9. The bankruptcy court here concluded that because the security interests vested after the Reform Act's enactment date, lien

Each of the appellate courts which has considered § 522(f) has either expressly or implicitly ruled that Congress intended § 522(f) to apply to post enactment security interests. Rodrock, 642 F.2d at 1196-97; Ashe, supra; Gifford, slip op. at 12 n. 3. The bankruptcy courts are in general accord. As is exhaustively discussed in those cases, both the transition sections prescribed in Title IV of the Reform Act[10]

avoidance pursuant to § 522(f) has only a "prospective not a retrospective, effect." Webber v. Credithrift of America, 7 B.R. 580, 584 (Bkrtcy. D. Ore. 1980). Other courts are in accord. In Re Pommerer, 10 B.R. 935, 947 (Bkrtcy. D. Minn. 1981); In Re Teske, 9 B.R. 18 (Bkrtcy. W.D. Mich. 1981); In Re Head, 4 B.R. 521 (Bkrtcy. D. Tenn. 1980). Although we agree that "post-enactment security interests should be accorded an analysis distinct from preenactment security interests in determining the constitutionality of Section 522(f) as applied," Matter of Ward, 14 B.R. at 558, it is still necessary to decide "whether or not Congress intended Section 522(f) to reach security interests created prior to the effective date of the Reform Act." Id.

10. As noted in Rodrock:

Cases filed in bankruptcy court shortly

and the "fresh start" concept inherent in § 522[11] provide forceful argument favoring

> after the October 1, 1979, effective date of the Reform Act would necessarily involved creditors' interests which came into being prior to the effective date of the Reform Act. As of October 1, 1979, the old Bankruptcy Act stood repealed. So, if, in a bankruptcy case filed on or after October 1, 1979, the Reform Act does not apply to creditors' interests which came into existence prior to October 1, 1979, then there would be no bnkruptcy law governing the particular matter at hand. We cannot believe that Congress intended such a statutory "gap."

642 F.2d at 1196.

11. If Section 522(f) were to apply prospectively only, then the abuses intrinsic in nonpurchase-money security interests in household possessions, as congressionally discerned, would linger for an indefinite period after Congress had acted to remedy the problem. Moreover, prospective application would effectively delimit a debtor's entitlement to exemptions which would otherwise be realized through lien avoidance. Thus, debtors filing petitions on or after October 1, 1979, which in the majority of proceedings would relate to debts acquired prior to the Reform Act's effective date, would be denied the benefit of a "fresh start" to the full extent intended by Congress. It is evident, therefore, that without the retroactive operation of Section 522, including the lien avoidance authority prescribed in Section 522(f), the fresh start concept, one of the central policy aspects of the Reform Act, would be significantly diluted. Matter of

retroactivity. We agree that Congress intended § 522(f) to apply retroactively to security interests created before October 1, 1979. There remains for consideration, however, the crucial question of whether the provisions of § 522(f) could constitutionally be applied to a security interest which vested prior to the effective date of the Act.

VI. Constitutionality

(a) Power of Congress

The Constitution expressly confers on the Congress the power to establish uniform laws on bankruptcy throughout the nation.[12] Generally, this authority "includes the power to discharge the debtor from his contracts and legal liabilities as well as to distribute his property." Hanover National Bank v. Moyses, 186 U.S.

Ward, 14 B.R. at 559.

12. "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4.

181, 188 (1902). Thus, bankruptcy legislation has traditionally operated to affect creditors' interests which vested prior to the effective date of the legislation. See Wright v. Union Central Life Ins. Co., 304 U.S. 502, 516 (1938).[13] Unlike the states, Congress is not prohibited from passing laws that impair contractual obligations.[14] Continental Bank v. Rock Island Ry., 294 U.S. 648, 680 (1935). See also Kuehner v. Irving Trust Co., 299 U.S. 445, 452 (1937). In fact, the very essence of bankruptcy laws is the modification or impairment of contractual obligations.

13. The prohibition against Congress passing "ex post facto" laws, U.S. Const. Art. I, § 9, cl. 3, applies only to laws which impose a punishment for an act which was not punishable at the time it was committed, i.e., refers only to criminal laws. Burgess v. Salmon, 97 U.S. 381, 385 (1878).

14. "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts . . ." U.S. Const. Art. I, § 10, cl. 1.

There is, however, "as respects the exertion of the bankruptcy power, a significant difference between a property interest and a contract, since the Constitution does not forbid impairment of the obligation of the latter." Kuehner, 299 U.S. at 451-52. But the "bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935).

(b) Radford

The split in the case law with respect to the constitutional issue presented is due in large part to divergent interpretations of Radford. In Radford the Court held that the Frazier-Lemke Act was unconstitutional under the Fifth Amendment. The Act, an amendment to the Bnkruptcy Code, was emergency legislation designed to provide relief for insolvent farmers by permitting them to obtain from the bankruptcy court a

five-year stay of state foreclosure proceedings while paying a fair annual rental which would be divided among secured and unsecured creditors. At the end of the five year period the mortgage could be extinguished by the payment of the appraised price at the beginning or end of the period of the appraised price at the beginning or end of the period at the option of the mortgagee. The Act specifically provided that it was to have retroactive effect. In concluding that the Frazier-Lemke Act was unconstitutional under the Fifth Amendment, the Court recognized that under the bankruptcy power the court may discharge a debtor's personal obligations, but held that it could not take for the benefit of the debtor substantive rights in specific property acquired by the creditor prior to the Act.[15]

15. The Court held that the Act had taken from the mortgagee the following property rights:

In Ashe, supra, the court concludes that Radford was effectively limited, if not tacitly overruled by Wright v. Vinton Branch of the Mountain Bank of Roanoke, 300 U.S. 440 (1937), and Helvering v. Griffiths, 318 U.S. 371, 400-401 & n. 52 (1943). Slip op.

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such a sale shall be held, subject only to the discretion of the court.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

295 U.S. 594-95.

at 12. On the other hand, the Court in Rodrock held that while Wright and other cases may well refine the rule of Radford, "they do not destroy the fundamental teaching of Radford, "they do not destroy the fundamental teaching of Radford that Congress may not under the bankruptcy power completely take for the benefit of a debtor rights in specific property previously acquired by a creditor." 642 F.2d at 1198.[16] The court in Gifford agreed with

16. Appellees argue that even assuming its continued vitality, Radford is limited to protecting interests of "substantial value" in real property. A lien is clearly an interest in property, 11 U.S.C. § 101 (28), and for Constitutional purposes, it makes no difference whether liens are on personal or real property. Cf. Armstrong v. United States, 364 U.S. 40, 44 (1960); Kuehner, supra. It is true that Congress noted the typically small market value of the exempted household effects, see note 1, para. 3, supra, and several courts have based their decisions to apply § 522(f) retroactively on their conclusion that creditors were not losing property rights of significant monetary value. E.g., Matter of Rutherford, 4 B.R. 510, 512-13 (Bkrtcy. S.D. W.D. Ohio 1980); In Re Ambrose, 4 B.R. 395, 400 (Bkrtcy. N.D. Ohio 1980). As noted in Gifford, however, "it is the value of that

the holding in Rodrock. Slip op. at 6-7.

(c) Notice of Enactment

While Radford may still be controlling as to property rights which vested prior to the enactment of new bankruptcy legislation, we conclude that it is inapplicable to the issue considered here. Justice Brandeis carefully noted that while the bankruptcy legislation considered in Radford was unconstitutional, "[t]he power over property pledged as security after the date of the Act may be greater than over property pledged before." Radford, 295 U.S. at 589 (emphases added).

Here the liens were acquired approximately eight months after the passage

right which is at issue, not the worth of the collateral." Slip op. at 11. We agree that a "property right is of value regardless of the worth of the object in which it is held, and is protected from governmental appropriation by the taking clause of the Fifth Amendment." Id.: In Re Hoops, 3 B.R. 635, 639-40 (Bkrtcy. D. Colo. 1980), aff'd., 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981). (No. 81-184).

of the Reform Act and approximately four months before its effective date. Obviously both parties had notice of the enactment and the provisions of the Act with respect to when its various sections and subsections would take effect. Whether the enactment date or effective date is controlling under the circumstances of these cases presents a close question. It is not surprising that the bankruptcy courts have reached different conclusions.

The bankruptcy court in these cases held that the retroactive effects of § 522(f)(2) are not so unreasonable or arbitrary as to deny due process; and that "It is not unreasonable to impute to credit companies and their attorneys the knowledge and understanding of a new law after that law has been enacted." 7 B.R. at 584. The court concluded accordingly that there should be a distinction between cases where the lien arose before November 6, 1978, and

those where it arose "between the enactment and effective dates of the Bankruptcy Code."

Typical of the cases holding that debtors are not entitled to avoid liens acquired before the effective date of October 1, 1979, is Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980). The decision in that case contains an analysis of prior cases involving the effect of notice of the passage of legislation with a postponed effective date.[17] The court concluded that where a statute itself "schedules a specific effective date, it is that postponed date and not the earlier date of enactment which controls." Id. at 16.

Although a close question is presented, we agree with the bankruptcy court in the instant cases that it is "not unreasonable to impute to credit companies and their

17. We do not find that any of these cases is sufficiently similar to dispose of this issue.

attorneys the knowledge and understanding of a new law after that law has been enacted." When Credithrift made the loans in July, 1979, it should have been fully aware that the exemption provisions of § 522 would become effective on October 1, 1979, and that any bankruptcy filed subsequent to that date could result in an avoidance of their liens on the exempt property. The bankruptcy court properly distinguished between cases where the liens arose before the enactment date and those arising after the enactment date where the creditor had knowledge of the prospective exemption provisions.

AFFIRMED.

RE: Webber and Yoder v. Credithrift, Nos. 81-3055/3128

SCHROEDER, Circuit Judge, Concurring Separately:

I agree with the result reached by the

majority. The 1978 Bankruptcy Reform Act exemption, which makes certain liens unenforceable after the effective date of the Act, constitutionally can be applied to a lien created after the statute was enacted but before it became effective. I write separately only because I think the majority makes the problem harder than it is.

Congress clearly intended this result. The statute unambiguously provides for it. At the time this lien was created, the creditor had full notice that under the new law the lien would be unenforceable in the event the debtor filed for bankruptcy after the new Act became effective. In my view, application of the statute to liens created after the statute was passed simply does not present a substantial question, much less a close one. See, e.g., Note, Bankruptcy -- Section 522(f) of the 1978 Code -- Constitutionality of its Application to Security Interests Pre-Dating Enactment

of the Code, 27 Wayne L. Rev. 1281, 1288-90, 1293, 1299, 1302 n.143 (1981); note, Constitutionality of Retroactive Lien Avoidance Under Bankruptcy Code Section 522(f), 94 Harv. L. Rev. 1616, 1617 n.10 (1981).

Congress could have made the Act effective from the date of its passage. Had it done so, application of the exemption provisions to this post-enactment lien would raise no possible question of retroactive interference with property rights. Instead, Congress gave some lead time for the public to gain familiarity with the new Act and to adjust debtor/creditor practice accordingly. The creditor can hardly claim to have been prejudiced by Congressional lieniency in deferring the effective date.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CREDITHRIFT OF AMERICA, INC., Petitioner, vs. THE UNITED STATES OF AMERICA and HARRY GEORGE WEBBER, SUSAN MARIE WEBBER, EVERETT YODER, JR., and ELIZABETH YODER, Respondents.	MOTION FOR CONSOLIDATION No.

Petitioner respectfully moves this court for an order consolidating the above-captioned case, presently on petition for review, with Rodrock v. Security Industrial Bank probable jurisdiction noted 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-184) for the reasons set out below.

Points and Authorities

These two cases should be consolidated because they both deal with substantially the same question. That is, whether 11 USC 522 can be applied retroactively to liens

perfected before the effective date of the Act. The specific question in Rodrock is whether 11 USC 522 can be applied to liens created even before the enactment date of the Act. In the present motions Petitioner prays that the court will also consider the application of 11 USC 522 to the liens created after the enactment date but before the effective date of the Act.

In the interest of time and completeness as well as that almost all of the courts that decided one or the other questions above at least touched on the other question, Petitioner feels that the interests of justice can best be served by allowing this motion and by having the court decide these important questions in one opinion.

GATTI & GATTI, P.C.

By: _____
Daniel J. Gatti #73103
Of Attorneys for
Petitioner

CERTIFICATE OF MAILING

I certify that I served the foregoing PETITION FOR A WRIT OF CERTIORARI, by depositing three true, full and exact copies thereof in the United States Post Office, at Salem, Oregon, on July 8, 1982, enclosed in a sealed envelope, with postage paid, addressed to:

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By: _____
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Of Attorneys for
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82-155

Office - Supreme Court, U.S.
FILED
DEC 9 1982
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CREDITHRIFT OF AMERICA, INC., Petitioner

vs.

THE UNITED STATES OF AMERICA, Respondent

SUPPLEMENTAL APPENDIX

Daniel J. Gatti
1761 Liberty St. S.E.
Salem, Oregon 97302
503-363-3443

Counsel for Petitioners

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re	)	
	)	
HARRY GEORGE WEBBER SUSAN MARIE WEBBER,	)	
	)	Case No.
Debtors.	)	380-00919
	)	
HARRY GEORGE WEBBER SUSAN MARIE WEBBER,	)	Adversary Proceeding No. 80-0080
Plaintiffs,	)	
	)	
vs.	)	OPINION
	)	
CREDITHRIFT OF AMERICA, INC., NO. 6,	)	
	)	
Defendant.	)	

Based on the Court's opinion on file herein,

Judgment is hereby awarded the plaintiffs, Harry George Webber and Susan Marie Webber, and the lien of the defendant, Credithrift of America, Inc., No. 6, on the household furnishings, household goods and appliances of the plaintiffs is hereby declared null and void pursuant to § 522(f)(2) of the Bankruptcy Code.

ENTERED at Portland, Oregon, on this

17th day of November, 1980.

/s/ FOLGER JOHNSON

FOLGER JOHNSON

Bankruptcy Judge

cc: John H. Durkheimer
Stanley Fields
Jonathan M. Hoffman

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re

HARRY GEORGE WEBBER SUSAN MARIE WEBBER, Debtors.	)	Case No. 380-00919
HARRY GEORGE WEBBER SUSAN MARIE WEBBER, Plaintiffs, vs. CREDITHRIFT OF AMERICA, INC., NO. 6, Defendant.	)	Adversary Proceeding No. 80-0080 OPINION

This proceeding has been brought by the debtors to avoid the lien of the defendant, Credithrift of America, on household furnishings, household goods and appliances of the debtors pursuant to § 522(f)(2) of the Bankruptcy Code. The bankruptcy petition was filed under Chapter 7 after October 1, 1979, and the case in which this adversary proceeding arises is therefore governed by such Code.

It has been stipulated that the

defendant's lien is a nonpossessory, nonpurchase-money security interest that arose after November 6, 1978, and before October 1, 1979, that debtors-plaintiffs claimed exempt the property covered by the security agreement and that said property was held for the personal, family or household use of the debtors and would be exempt except for the defendant's lien.

11 USC § 522(f)(2) purportedly gives the Bankruptcy Court the right to avoid such lien and permit the debtors to retain such goods as exempt property without paying Credithrift. The sole question for the Court to decide is whether the avoiding of such lien violates the Fifth Amendment to the United States Constitution by taking property without due process of law if the security interest was created after November 6, 1978, the enactment date of the Bankruptcy Reform Act, and before October 1, 1979. While some portions of the Bankruptcy

Reform Act of 1978 took effect upon enactment, the substantive part of the law comprising Title I of such Act and now commonly referred to as the Bankruptcy Code was only to take effect and apply to cases filed in the Bankruptcy Court on and after October 1, 1979.

Both parties filed briefs on the legal question and have waived oral argument. The United States Attorney was duly advised of the constitutional question and has intervened, filing a brief in support of the constitutionality of the law.

Legislative Intent

To determine if Congress intended § 522(f)(2) to apply to security agreements created between the enactment date and effective date of the Bankruptcy Code, it is helpful to begin with the legislative history of the statute. When drafting § 522(f)(2), Congress was addressing a long-practiced evil of consumer financing - where

a loan company would take a blanket security interest in all of a debtor's household goods in exchange for a small loan of money. The loan company would have no real intention of seizing the debtor's used furniture and other furnishings in the event of a default by the debtor, but if the debtor tried to discharge the debt in bankruptcy, the loan company would threaten a seizure of the debtor's goods in order to extract a reaffirmation promise. The debtor, unaware that the creditor was not seriously considering a levy on the goods and usually without the assistance of counsel, would give the reaffirmation promise and thereby place himself in the same unfortunate position he was in before the filing of bankruptcy.

The above-described evil was no less common and no less repugnant before October 1, 1979, than after that date, and there is no indication in legislative history or in

the Code itself that Congress felt security agreements entered into between the enactment date of November 6, 1978, and the effective date of October 1, 1979, should be immune from the effects of its remedial legislation. To the contrary, Congress clearly indicated that all debtors filing bankruptcy petitions after October 1, 1979, should receive equal rights and benefits. In its legisltaive history to § 402 of the Transition Title (Title IV) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, Congress explained that the new Bankruptcy Code which went into effect on that date would apply to all cases filed on or after that date and to all substantive and procedural matters pertaining to those cases. (H. Rep. No. 95-595, p.459.) See In re Head, 4 B.R.*521, 524; 6 BCD 489 (D.

*Citations to B.R. refer to West's Bankruptcy Reports, which is a new bankruptcy reporting service of West Publishing Co.

Tenn. 1980). No exceptions were mentioned for debtors who may have had security agreements pre-dating the effective date.

What Congress was hoping to achieve generally with the passage of the federal exemption statute was a vehicle to provide consumer debtors with a meaningful rehabilitation from their financial failings. The statute was intended to relieve debtors from their oppressive debts while at the same time retain enough necessities of life for a "fresh start" which would keep them off public welfare.

Consequently, subsection (d)(3) of § 522 permits a debtor to exempt the first $200.00 of his interest in any item of household furnishings or goods. Any excess value will usually be exempt through the use of subsection (d)(5) which gives the debtor another $400.00 general exemption and the right to apply the "spill over" from the unused portion of the homestead exemption

under subsection (d)(1). What subsection (f) does is give the debtor the complementary right of enforcing those exemptions in the face of nonpossessory, nonpurchase-money security interests. By being able to avoid the liens from security interests, a debtor is assured that his exemption will not be nullified by such tactics as the enforcement, or threat of enforcement, of a blanket security interest in all his household goods. If a debtor would not be permitted to avoid the security interest simply because it was created by an agreement made before the effective date of the Code, his exemption right itself would become meaningless, and even though he were a debtor filing after October 1, 1979, he would wind up in the same predicament as was abhored by the Code's drafters. Such a consequence could not have been intended by Congress.

No Unreasonable Impairment of Contracts

Apart from Congress's intent in passing § 522(f)(2) is the question of whether Congress had the power to affect security agreements entered into before the effective date of the statute. One argument which has been advanced in cases cited by attorneys for the creditors is that a statute cannot constitutionally destroy the obligations of private contracts. However, this argument is invalid for two reasons as applied to the facts of the present case. First, it can be said that every exercise of Congress's bankruptcy power has the effect of impairing contracts to one degree or another. Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902). Secondly, the constitutional restriction against impairing contracts found in Article I, section 10, clause 1, is made applicable only to the States, not to Congress. For a court to find that a Congressional act is an unconstitutional

impairment of contrct it must do so through an application of the due process clause of the Fifth Amendment, not through an application of the contract-impairment clause. This means that the court must not only find that the statute impairs contracts, but that it also is so grossly arbitrary and unreasonable as to be incompatible with fundamental law.

In the case of Continental Bank v. Rock Island Ry., 294 U.S. 648, 680 (1934), creditor-banks challenged a law permitting an injunction against the sale of collateral upon a debtor's default, even though the express terms of their contracts provided for such sale. In concluding that the legislation was a valid exercise of Congress's bankruptcy power, the Supreme Court held that the law was drafted with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts and that the effect on

creditors was only collateral or incidental. The court stated at page 680:

> "The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. . . . Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts. . . . And under the express power to pass uniform laws on the subject of bankruptcies, the legislation is valid though drawn with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts. See Hanover National Bank v. Moyses, Supra, at p. 188. So much necessarily results from the nature of the power, and this must have been within the contemplation of the framers of the Constitution when the power was granted."

By analogy, the legislation which is the cause of controversy in the present case was enacted by Congress for the primary purpose of making a debtor's exemptions meaningful and effective, not for the

purpose of destroying creditors' rights from security agreements. The effect which the statute has on creditors is purely collateral and incidental to the real thrust of the statute. As Judge Coutrakon of the U.S. Bankruptcy Court for the Central District of Illinois stated in In re Beck: "I believe that Congress was acting reasonably in its desire to rehabilitate the debtor and did not enact legislation affecting rights of secured creditors to the extent that they were denied due process of law." 4 B.R. 661 at 664; 6 BCD 491 (1980).

To bolster the conclusion that Congress was acting only collaterally and incidentally with respect to creditors' rights is the recognition that Congress possessed the complementary power to its bankruptcy power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, section 8, clause 8 of the

Constitution. Congress having acknowledged that it was a general goal of the Bankruptcy Reform Act to provide an effective modern bankruptcy mechanism for consumer debtors and to enable them to emerge from bankruptcy with adequate possessions, it is only a small logical step to realize that a debtor's avoidance of the types of liens subjecting all of his household goods and furnishings to a pre-bankruptcy security agreement was a necessary and proper measure for achieving the Congressional goal. See U.S. Life Credit Corporation v. Steinart, 2 CBC 2d 166; CCH Bnkr. Law Reports, par. 67,457 (W.D.La. 1980).

Section 522(f)(2) Not Retroactive

The principal argument advanced by attorneys for the creditors in the present case is that an application of § 522(f)(2) to security agreements made prior to its effective date violates due process because of its retroactive operation. If we were

dealing with security agreements made prior to the enactment date of the statute rather than its effective date, this court would agree with the creditors' position, and in fact, this court previously has rendered an opinion to that effect in In re Hawley, 6 BCD 365, 4 B.R. 147 (Judge Henry L. Hess, April 25, 1980). However, as to security agreements created during the "gap" period - between the November 6, 1978 enactment date and the October 1, 1979 effective date - this court cannot accept the creditors' challenge based on retroactivity.

Congress clearly had the power to make laws affecting bankruptcies by virtue of Article I, section 8, clause 4 of the Constitution, and Congress exercised that power by enacting the Bankruptcy Reform Act on November 6, 1978, including § 522(f)(2). Any effect on security interests created after that time was a prospective not a retrospective, effect. Application of

11 USC § 522(f) in this case does not violate the taking of property clause of the Fifth Amendment because the parties entered into the furniture loan agreement after Congress enacted the law. Defendant cannot successfully claim that Congress at the time of enactment lacked the power to affect later-created property. Consequently, a one-year delay in making the law effective logically could not diminish Congress's constitutional authority to subject such property to the avoidance powers of the new Code. Although it is not clear from the legislative history why Congress decided to have an eleven-month hiatus it is more logical to assume that Congress wished to provide an adjustment period for the business community to familiarize itself and prepare itself for the sweeping changes which the new Code was to make in the law rather than to assume Congress felt it could not duly exercise its bankruptcy power for

eleven months after the Code's enactment.

Retroactive Effect Not Unfair

Even if this court were to accept the premise that § 522(f)(2) operates retroactively on security agreements created during the "gap" period, we would not be prepared to conclude that such retroactivity in itself makes the statute unconstitutional. As when making out a case for an impairment of contractual obligations by Congress, it is necessary to show that the retroactive effects of a statute are so unreasonable and arbitrary as to deny due process under the Fifth Amendment. Usery v. Turner, 428 U.S. 1 (1976); Matter of U.S. Financial, Inc., 594 F.2d 1275, 1281 (9th Cir. 1979); In re Head, 4 B.R. 521, 523; 6 BCD 489 (D.Tenn. 1980); and In re Beck, 4 B.R. 661; 6 BCD 491 (C.D. Illinois 1980). In Beck, a case almost identical in fact and law to the case at hand, the bankruptcy judge stated at page 664: "[T]he fact that

the Code applies retroactively presents no concern unless the retroactivity is unreasonable." Just as the judge in that case found § 522(f)(2) of the Bankruptcy Code not unreasonable as applied to "gap" - created security agreements, neither does this court find that the retroactive effect of the statute, if there is any, is unreasonable, arbitrary, capricious, or unfair.

It is not unreasonable to impute to credit companies and their attorneys the knowledge and understanding of a new law after that law has been enacted. Such persons hardly can claim "unfair surprise" by an enacted statute of Congress having such a serious impact on their industry. That they continued after November 6, 1978, to make and approve nonpurchase-money loan agreements containing "blanket security" interests in household goods shows either an inexcusable ignorance of the law or a

willingness on their part to accept the risks inherent in the law. As stated by Bankruptcy Judge Clive W. Bare for the District of Tennessee in In re Head, 4 B.R. 521, 524 (1980), in cases nearly identical to ours:

> "The delay of over eleven months between the enactment of the Bankruptcy Code and its effective date gave creditors adequate time to familiarize themselves with the provisions of the Code and the effects it would have on their relationships with debtors. In the instant cases, both loans were negotiated after the enactment of the statute. Home Credit cannot say that the effect of the Code on its purported lien rights was a total surprise."

In a situation involving federal tax laws, the Court of Appeals for the Eighth Circuit recently held that a retroactive application of a tax increase was not unconstitutional even though the law approving the increase was enacted in 1976 and was made to apply to transactions in 1975. The court said that taxpayers should have anticipated the imposition of an increase in the minimum tax

because such a tax was in existence at the time they allegedly contracted to sell the real estate. Thus, the retroactive increase was not so harsh or discriminatory as to violate the Constitution. Buttke v. Commissioner of Internal Revenue, 625 F.2d 202, 203 (1980).

It should be noted that § 522(f)(2) is not so sweeping as to deprive loan companies and other such creditors of all their rights in security agreements made after November 6, 1978. First the statute does not apply to purchase-money security agreements, but rather to nonpurchase-money agreements where debtors already own the goods made subject to security interests. Secondly, the statute does not necessarily permit a debtor to avoid an entire security interest, but rather just a debtor's own exemptable equity in the secured household goods, tools of trade or health aids. Such exemptable interest for household goods is limited to

$200.00 per item, unless the debtor claims any excess over $200.00 under (d)(5) of § 522. A debtor who exhausts his entire $7,500.00 of his (d)(1) exemption plus his additional $400.00 of his (d)(5) exemption all on a homestead claim cannot avoid a security interest from a nonpurchase-money security agreement to an extent of over $200.00 in any one household item. Thus, if the particular secured item is worth more than that amount, the debtor would have to choose among three courses of action: giving up possession of the item to the secured creditor, paying the creditor the amount of the creditor's alleged claim minus $200.00, or paying the creditor the fair market value of the item minus $200.00 if the value is less than the creditor's claim. See U.S. Life Credit Corporation v. Steinart, 2 CBC 2d 166; CCH Bnkr. Law Reports par. 67,457 (W.D.La. 1980), and Matter of Meyers, 5 BCD 1306 (E.D.Mich.

1980).

Thirdly, the statute does not apply to security interests in collateral consisting of anything other than household items listed in § 522(d)(3), tools of trade in § 522(d)(6), and professionally prescribed health aids listed in § 522(d)(9). For other types of collateral where the value at the time of the loan may have been equal to or greater than the security interest (notably in the case of vehicles) creditors are able to continue full enforcement of their nonpurchase-money security agreement rights regardless of when those agreements were created. In re Meyers, supra. As explained by Bankruptcy Judge Rodney Bernard, Jr. in U.S. Life Credit Corporation v. Steinart, supra, at page 171:

> ". . .Sec. 522(f) was adopted specifically in recognition of the fact that some creditors lending money to a consumer debtor will take a security interest in all of the debtor's household goods, and then have the debtor waive his exemption rights. The creditor then may use

> threats of repossession as a means of leverage in obtaining payment. Although the household goods themselves may be of little resale value, the replacement cost is high, so the debtor is coerced into making payments he simply cannot afford to make. . . .
>
> "Since the purpose of Sec. 522(f) is to remedy the effect of an overreaching creditor on an uninformed debtor, it would seem that in all fairness the results should differ where the property in question is truly valuable and was given as security due to its value. . . . [The statute's] application should not be extended beyond the evil it attempts to reach."

Finally, even in those situations where all the conditions for lien avoidance under § 522(f)(2) are met by the debtor, the creditors are not left totally without recourse. They still have the right to file proofs of claim as unsecured creditors and share in any possible distribution of assets in the estate. It is true that this right may not be worth much since in most cases there is an unlikelihood of any assets remaining for distribution. However, the chances of assets may in fact be no lower

than the chances of a creditor's actually conducting a seizure of a debtor's used household furniture and furnishings under a "blanket security interest" in the goods permitted under the old law. In other words, the creditor's expectations of converting its blanket security interest into any meaningful monetary recovery is not much different than his expectations of recovery of a share of assets from the debtor's estate. What really has been of value to the creditors under their blanket security interests has been the ability to extract reaffirmation promises from debtors through threats of foreclosures rather than actual foreclosures. It is this threat which is removed by § 522(f)(2), and this court does not feel it unfair to remove such threat with respect to "gap" security agreements made any time after the enactment of the statute.

In reviewing the numerous opinions on §

522(f)(2) from other courts, we find that to date six have fact patterns from which it can be ascertained that security agreements were made during the "gap" period, and in five of those opinions, courts have reached the same result as we reach today. See In re Head, 4 B.R. 521, 6 BCD 489 (D. Tenn. 1980); In re Beck, 4 B.R. 661, 6 BCD 491 (C.D. Ill. 1980); U.S. Life Credit Corporation v. Steinart, 2 CBC 2d 166, CCH Bankr. Law Reports, par. 67457 (W.D. La 1980); Matter of Cox, 2 CBC 2d 255 (S.D. Ohio 1980), and In re Beard, 2 CBC 2d 895 (S.D. Iowa 1980). In re Panesky, 5 B.R. 201, 2 CBC 2d 835 (N.D. Ohio 1980), refused to avoid the security agreement, but on a different basis not affecting our reasoning in the present case. Only in the first three cases did the court consider the question of constitutionality or retroactivity. Beard rested on a definition of household goods or appliances and Cox and

Panesky dealt with Ohio law, which state had voted to prevent use of the federal exemptions by Ohio residents.

Even in the cases involving security agreements made prior to the enactment date of the statute, some courts have allowed debtors to avoid security interests: Matter of Rutherford, 4 B.R. 510, CCH Bankr. Law Reports, par. 67,534 (S.D. Ohio 1980); In re Ambrose, 6 BCD 454 (N.D. Ohio 1980); In re Curry, 5 B.R. 282, 2 CBC 2d 710 (N.D. Ohio 1980); In re Baker, 5 B.R. 397, 6 BCD 747 (W.D. Miss. 1980). The reasoning in Rutherford, Ambrose and Curry in particular applies equally well to support the avoidance of liens created during the "gap" period. Five others have reached a contrary result: In re Hawley, 4 B.R. 147, 6 BCD 365 (D. Oregon 1980); In re Rodrock, 3 B.R. 629, 1 CBC 2d 1022 (D.Col. 1980); In re Hoops, 3 B.R. 635, 1 CBC 2d 983 (D.Col. 1980); In re Jackson, 4 B.R. 293, 6 BCD 612 (D.Col.

1980); and In re Pierce, 4 B.R. 671 (W.D.Okla. 1980).

There are other cases dealing with § 522(f)(2) where it is not shown when the security interest on household goods was first perfected, but none of them has held the law invalid.

Recognizing that there should be a distinction between cases where the lien arose before November 6, 1978, and those where it arose between the enactment and effective dates of the Bnkruptcy Code, the court concludes that § 522(f)(2) is constitutional in so far as it applies to liens arising between November 6, 1978, and October 1, 1979, and the plaintiffs are entitled to the voiding of the defendant's lien on their household furnishings, household goods and appliances.

DATED this 17th day of November, 1980.

/s/ FOLGER JOHNSON

FOLGER JOHNSON
Bankruptcy Judge

cc: John H. Durkheimer
Stanley Fields
Johathan M. Hoffman

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No. 82-155

In the Supreme Court of the United States

OCTOBER TERM, 1982

CREDITHRIFT OF AMERICA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that application of the lien avoidance provision of the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 522(f)(2), to liens acquired after enactment of the statute but before its effective date is unconstitutional.

1. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 11 U.S.C. (Supp. IV) 101 *et seq.*, was enacted in November 1978 and became effective on October 1, 1979. Under the Act, a debtor may "avoid the fixing of a lien * * * to the extent that such lien impairs an exemption * * * if such lien is * * * a nonpossessory, nonpurchase-money security interest in * * * household furnishings, household goods, * * * [or] appliances * * *." 11 U.S.C. (Supp. IV) 522(f)(2).

On July 2, 1979, petitioner made a loan to Everett and Elizabeth Yoder, receiving in return a note for $2,508.90 and a signed form in which the Yoders pledged their household furnishings, goods, and appliances as security for the

loan (Pet. App. 7-8). On July 23, 1979, petitioner made a similar loan to Harry and Susan Marie Webber, receiving in return a note for $3,224.96 and a similar security agreement (*id.* at 8). The parties stipulated that both liens were nonpossessory, nonpurchase-money security interests acquired during the period between the enactment of the Bankruptcy Reform Act and its effective date (*ibid.*).

Subsequent to the effective date of the Bankruptcy Reform Act, the Yoders and the Webbers filed petitions in bankruptcy (Pet. App. 8). Pursuant to Section 522(f)(2), each couple sought to avoid petitioner's liens on their exempt household property (*ibid.*). In response, petitioner asserted that Section 522(f)(2) cannot constitutionally be applied to liens arising during the "gap" between the enactment and the effective date of the Act. Pursuant to 28 U.S.C. 2403(a), the United States intervened in the bankruptcy court to defend the constitutionality of Section 522(f)(2) as applied in these cases (Pet. App. 8-9).

The bankruptcy court held that there is no constitutional barrier to the avoidance of such "gap" liens under Section 522(f)(2) (Pet. Supp. App. 36-60). The court reasoned that permitting debtors to avoid "gap" liens was not a retrospective application of Section 522(f)(2) at all; any effect on liens created after the Act's enactment was a *prospective* effect of the statute (Pet. App. 48-49). Assuming arguendo that the application of Section 522(f)(2) here could be characterized as retrospective, the bankruptcy court concluded that it was not so "unreasonable, arbitrary, capricious, or unfair" (Pet. App. 51) as to violate the Fifth Amendment.

The court of appeals affirmed (Pet. App. 1-31; 674 F. 2d 796 (1982)). After noting the flood of litigation involving the constitutionality of retrospective application of Section 522(f)(2) (see Pet. App. 11-16), the court of appeals stated that "a close question is presented" by the instant case,

but "agree[d] with the bankruptcy court * * * that it is 'not unreasonable to impute to credit companies * * * the knowledge and understanding of a new law *after* that law has been enacted' " (*id.* at 28-29) (emphasis in original).

In a separate concurrence (Pet. App. 29-31), Judge Schroeder stated that this case "simply does not present a substantial question, much less a close one" (*id.* at 30). She explained (*id.* at 31):

> Congress could have made the Act effective from the date of its passage. Had it done so, application of the exemption provisions to this post-enactment lien would raise no possible question of retroactive interference with property rights. Instead, Congress gave some lead time for the public to gain familiarity with the new Act and to adjust debtor/creditor practice accordingly. The creditor can hardly claim to have been prejudiced by Congressional leniency in deferring the effective date.

2. As petitioner acknowledges (Pet. 11), no other court of appeals has ruled on the constitutionality of Section 522(f) as applied to "gap" liens.[1] The flood of litigation involving the constitutionality of retrospective application of Section 522(f) has involved application of the Section

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[1]The Third and Seventh Circuits clearly agree with the decision below, however, because they have held Section 522(f) constitutional even as applied to pre-enactment liens. *In re Gifford*, No. 81-1174 (7th Cir. Aug. 18, 1982) (en banc); *In re Ashe*, 669 F. 2d 105 (3d Cir. 1982), petition for cert. pending, No. 81-1866 (filed Apr. 6, 1982). The one court of appeals that has held unconstitutional retrospective application of Section 522(f) expressly limited its analysis to liens arising before the enactment of the Bankruptcy Reform Act (see *Rodrock* v. *Security Industrial Bank*, 642 F. 2d 1193, 1196 n.3 (10th Cir. 1981), prob. juris. noted *sub nom. United States* v. *Security Industrial Bank*, No. 81-184 (Dec. 14, 1981)), and that decision in no way suggests that avoidance of a "gap" lien would be unconstitutional. See page 5, *infra*. See also *in re Gifford*, *supra*, slip op. 34 n.6 (Pell. J., dissenting).

to liens arising *before* its enactment. See generally cases cited at Pet. App. 11-16. Thus, there is no conflict in the lower courts on the issue presented here that warrants this Court's attention.

Because petitioner's liens arose after the enactment of the Bankruptcy Reform Act, petitioner's assertion that this case conflicts with *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), is totally without foundation. In *Radford*, the Frazier-Lemke Act of 1934 was held unconstitutional because it deprived mortgagees of rights in specific property that had vested prior to the enactment of the statute. See 295 U.S. at 589, 595. The Court specifically noted, however, that while the legislation at issue in the case was unconstitutional, "[t]he power over property pledged as security after the date of the Act may be greater than over property pledged before." 295 U.S. at 589.

In our view, Judge Schroeder's concurring opinion below is correct; this case presents no substantial constitutional question. Congress could have made the Bankruptcy Reform Act effective immediately upon its enactment. Had it done so, there would be no doubt whatsoever that Section 522(f)(2) could be applied constitutionally to liens created eight months later, such as those involved in this case. Because enactment of the Bankruptcy Reform Act put petitioner on notice that, after the effective date of the Act, nonpossessory, nonpurchase-money security interests in exempt household goods would be subject to avoidance, any security agreements concerning such goods entered into by petitioner after enactment of the Act were subject to this condition. See *Diamond Glue Co.* v. *United States Glue Co.*, 187 U.S. 611, 615 (1903); *Pinney* v. *Nelson*, 183 U.S. 144, 147 (1901). And because petitioner was fully aware when it entered into the security agreements that the liens would be subject to avoidance under Section 522(f)(2) after October 1, 1979, application of the statute to these

liens is not unfair and in no way interferes with any "investment-backed expectation" of petitioner's that would suggest an unconstitutional taking. Cf. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

For the foregoing reasons, we do not agree with petitioner (Pet. 13) that this case is "similar" to *United States* v. *Security Industrial Bank*, No. 81-184, which is now pending before this Court. That case involves the constitutionality of Section 522(f)(2) as applied to nonpossessory, non-purchase-money liens acquired *before* enactment of the Bankruptcy Reform Act. As explained in our brief in that case, we contend that Section 522(f)(2) is constitutional as applied to such pre-enactment liens. But even if our view is rejected and the judgment in *Security Industrial Bank* is affirmed, the decision below would not be called into question because petitioner acquired its liens with full knowledge, and subject to the condition, that they might be avoided in bankruptcy under Section 522(f)(2) after October 1, 1979. Accordingly, it is unnecessary to hold the petition in this case pending the disposition of *United States* v. *Security Industrial Bank, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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